# No. 22026

In the

# United States Court of Appeals

*For the Ninth Circuit*

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JOHN A. METHEANY,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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On Appeal From the United States District Court
for the District of Arizona

## Reply Brief for Appellant

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**REPLY TO APPELLEE'S ARGUMENT THAT IT WAS NOT IN ERROR TO ADMIT EVIDENCE ON THE CONCEALMENT COUNT WHICH WAS EXACTLY THE SAME EVIDENCE AS THAT INTRODUCED AT THE PRIOR TRIAL WHERE THERE WAS A JUDGMENT OF ACQUITTAL.**

The government concedes on page 7 of its brief that the government admitted evidence of the appellant's handling of the funds entrusted to him by Sandoval. It is interesting to observe that over half of the government's oral testimony and approximately three-quarters of the exhibits admitted into evidence went to the concealment of assets

count of which the appellant had already been found not guilty. The government's position on this was that the concealment of assets evidence was introduced to show motive for the appellant's alleged perjury or false oaths. This was the government's position as stated on page 12 of the transcript of record. Appellant's counsel at the time of trial immediately objected to this evidence and requested a continuing line of objection (Tr. Vol. 1, pages 12-13).

Although the concealment count and the false oath counts grew out of the same bankruptcy, they did not grow out of the same transaction. The evidence of the concealment of funds was not an essential element of the crime. It had nothing to do with the crime whatsoever. However, the government contends that that is the reason the false statements were given. Therefore, it was not essential to the government's case to introduce evidence of the crime of concealment for which the appellant had already been acquitted, but, rather, we make the forthright assertion to the Court that this prejudiced the jury. An additional fact, which would be humorous if not for its tragic consequences, is that government Exhibit 38 (which was the most damaging exhibit against the defendant) went to the concealment count and was an exhibit apparently not found but certainly not used by the government in the previous trials for concealment.

Unlike *Hernandez v. United States,* 370 F. 2d 171, the concealment was not necessary to prove in order to show the perjury. All that is necessary to show perjury is that the answers were not true. None of the evidence of concealment was used to show the answers were not true, but, rather, the government used it purely as motive. This they were not allowed to do on the grounds of the offense being prohibited to be used by reason of collateral estoppel and

res judicata. If we were less than clear initially, it behooves us to restate our position as to res judicata and collateral estoppel along with the natural prejudice of evidence of another crime. Res judicata applies in criminal cases as well as civil cases, and an exhaustive examination of the recent cases in this area is found at 9 ALR 3d 203. The exact same issues, which were litigated and resulted in a judgment of acquittal at the first trial, were relitigated at the second trial and forced the defendant to once again defend himself against charges of which he had already been acquitted. This is particularly true on the cross-examination of the defendant-appellant (see pages 289-306 of Vol. 2 of the Transcript of Record, especially at pages 291 and 295).

The key issue in the first trial was whether or not the defendant received sums of money as represented by the two checks (government's Exhibits 10A and 10B). The jury must have found that he did not because they acquitted him of concealment of funds. These checks were made out to nonexistent corporations. The government introduced this exact, same evidence at the trial for which the verdict is now being appealed.

In addition, the government introduced Exhibit 38, which showed that the defendant-appellant borrowed funds from Graff in order to pay Sandoval the $1285.80 which represented the total of the two checks after the F. B. I. stepped into the case. In response to Appellant Metheany's claim of reversible error committed by the trial court in admitting evidence implicating him in alleged concealment of assets in bankruptcy, the government relies solely on the theory that the evidence was admissible, for negating the possibly innocent focus of the defendant, and as proving the defendant's motive for perjuring himself. For the proposition that the evidence was properly admitted, the government relies upon

*Schwartz v. United States,* 160 F.2d 718 (C.A. 9, 1947), *Reed v. United States,* 364 F.2d 630 (C.A. 9, 1966). Neither case is in point.

In the *Reed* case, the defendants were charged with interstate transportation of kidnapped persons. At the trial, evidence was adduced tending to show that the defendants had been involved, immediately preceding the crime upon which they stood trial, of an armed robbery. With respect to the armed robbery, there is no indication that these defendants were ever charged or tried for armed robbery. In the instant case, the defendant was not only indicted for concealing the assets of a bankrupt, but he was acquitted of that charge by the jury. The Appellant Metheany believes this distinction to be vital. The fact that a duly impaneled jury, after having heard all of the evidence, has found the defendant not guilty of having concealed the assets brings the doctrine of collateral estoppel into play. This theory was unavailable to the defendant Reed; and, as Appellant Metheany pointed out in his opening brief, *Reed v. United States* is inapplicable to the instant appeal.

The second case relied upon by the government is *Schwartz v. United States, supra.* In *Schwartz,* two separate indictments were returned against the defendant, charging separate robberies on March 31, 1945, and April 22, 1945. The first of these two charges to go to trial was the robbery which allegedly took place in April of 1945. At that trial, evidence implicating the defendant in the robbery which allegedly took place in March of 1945 was admitted. On appeal, the defendant claimed that the admission of this testimony into evidence was prejudicially erroneous. The Court of Appeals affirmed the judgment of the District Court on the theory that the evidence was corroborative of the testimony of an accomplice and that it tended to show a

common-plan scheme or design. The *Schwartz* case is distinguishable on the following bases:

1. The evidence which was introduced at the trial court did not show, nor was it intended to show, motive of the defendants.

2. Schwartz was indicted for crimes which were identical except as to date and time.

3. The defendant's attack on appeal was based upon the misconduct of the prosecutor, and the Court found that the defendant had failed to complain of such misconduct in the trial court.

4. Most importantly, the second indictment in the *Schwartz* case was dismissed while in the instant case the defendant was found not guilty by jury after trial.

As additional authority for appellant's proposition that evidence relevant to the crime of concealment, of which the defendant was acquitted, was improperly admitted in the defendant's perjury trial, appellant cites the cases of *United States v. Kramer,* 289 F.2d 909 (C.A. 2, 1961), and *United States v. DeAngelo,* 138 F.2d 466 (C.A. 3, 1943). In the *Kramer* case, the defendant was charged and found not guilty of robbery.

In *United States v. Kramer, supra,* the defendant was originally indicted for the offense of burglary. The trial on this indictment resulted in a judgment of acquittal. Thereafter, the defendant was indicted for conspiracy to commit the aforementioned burglaries. During the trial on the conspiracy indictment, the government elicited, for the second time, testimonial evidence of an alleged co-conspirator implicating Kramer. The defense reasonably objected to the introduction of this evidence. The trial court overruled these objections and admitted the evidence. The failure of the District Court to exclude this testimony formed the thrust

of defendant's appeal. We are thus presented with a decision of the Court of Appeals, 2 Cir., based upon identical critical facts.

The precise language of *United States v. Kramer, supra,* is so dispositive of the instant case as to require the lengthy quotation which follows:

> "Appellant's alternative contention rests on that important principle of law of judgments, unhappily dubbed 'collateral estoppel,' which 'operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action.' It is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain. Coffey v. United States, 1886, 116 U. S. 436, 442-443, 6 S. Ct. 437, 29 L. Ed. 684 [criminal judgment applied as collateral estoppel in civil case]; United States v. Oppenheimer, 1916, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed 167; United States v. Adams, 1930, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807; Sealfon v. United States, 1948, 332 U. S. 575, 578, 68 S. Ct. 237, 92 L. Ed. 180; Hoag v. State of New Jersey, 356 U. S. 464, 470-471, 78 S. Ct. 829, 2 L. Ed. 913."

In *Sealfon v. United States,* 332 U. S. 575, 68 S. Ct. 237, 92 L. Ed. 180, at 332 U. S. at page 578, the Supreme Court upheld the doctrine of res judicata in criminal cases where it said

> "But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States v. Oppenheimer,* 242

U. S. 85, 87; *United States v. De Angelo,* 138 F. 2d 466, 468; 147 A. L. R. 991; see *Frank v. Mangum,* 237 U. S. 309, 334) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States v. Adams,* 281 U. S. 202, 205."

The *Kramer* case, *supra,* went on to say:

"A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue." 289 F. 2d at page 916.

"More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614,—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U. S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar." 289 F. 2d at 919.

*United States v. De Angelo,* 138 F. 2d 466, is strikingly similar to the *Kramer* case referred to above. Here again, the defendant was originally charged and then acquitted of the substantive offense of robbery and was subsequently indicted for conspiracy to commit robbery. "The question

thus presented is whether the government is estopped from relitigating in a criminal trial facts theretofore materially in issue at a former trial between the same parties for a different criminal offense which resulted in a verdict of acquittal." 138 F. 2d at 468. The Court held "the conclusiveness of a fact which has been competently ajudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. *United States v. Adams,* 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807." 138 F. 2d at 468.

It is appellant's view of the instant case that he has been convicted of perjury by the use of evidence which showed that he allegedly was involved in the concealment of the assets of a bankrupt, a charge of which the defendant was acquitted. The appellant is unable to see how the introduction into evidence of two checks, purporting to show that the defendant received and therefore concealed certain assets of a bankrupt, which checks were received into evidence at his previous trial where he was acquitted, can be permitted to demonstrate the defendant's motive for perjury to any jury. Such evidence not only is in violation of the doctrine of collateral estoppel but it absolutely precluded the defendant from obtaining his fundamental right to a fair trial. Appellant, therefore, again urges that a judgment of acquittal be entered or, alternatively, a new trial granted.

Respectfully submitted,

Sheldon Green

*Attorney for Appellant*

## CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with these rules.

SHELDON GREEN

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Phoenix, Arizona
264-7596



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUT

JOHN A. METHENY,

Appellant. NO. 22, 026

vs.

PETITION FOR HE

UNITED STATES,

Respondent.

Now comes the appellant and petitions the court for rehea
matter on the following grounds:

The Court did not pass on the issue of whether or not the
collateral estopple applies in criminal cases,further, the co
on the issue of whether or not the doctrine of collateral esto
in this case. The opinion of the court is directly contrary t
spirit of US vs Kramer (1961) 289 Fed 2 902, 2d cir.

Sheldon Green by

SHELDON GREEN

Now comes Jerome Berg and first being sworn says: I am a
United States, over 18 years of age, employed in San Franc
and not a party to this action; I served a true copy of the for

by mail by placing it in an envelope, which envelope was sealed, carried fully prepaid postage, was deposited in the U.S. Mail at San Francisco, California on March 15, 1968, and was addressed as follows:

US Attorney, Cecil Pool
Federal Building
San Francisco, California.

JEROME BERG

STATE OF CALIFORNIA, )
City and County of San Francisco ) ss.
)

On this 15th day of March, in the year 1968 before me, Harold Silen, a Notary Public, State of California, duly commissioned and sworn, personally appeared JEROME BERG known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, the day and year in this certificate first above written.

HAROLD SILEN, Notary Public, State of California

HAROLD SILEN
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF
SAN FRANCISCO

My Commission Expires August 19, 1970